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5 UNITED STATES DISTRICT COURT
 6 EASTERN DISTRICT OF WASHINGTON

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|-----------------------------|---|------------------------------------|
| 7 UNITED STATES OF AMERICA, |) | |
| |) | NO: CR-13-6025-EFS |
| 8 Plaintiff, |) | |
| |) | |
| 9 v. |) | |
| |) | GOVERNMENT'S RESPONSE TO |
| 10 LEONEL MICHEL VARGAS, |) | DEFENDANT'S MOTION TO |
| |) | SUPPRESS EVIDENCE FROM |
| 11 Defendant. |) | VIDEO SURVEILLANCE POLE CAM |
| 12 _____ |) | |

13 The Plaintiff, United States of America, by and through its
 14 Attorney, Michael C. Ormsby, United States Attorney for the
 15 Eastern District of Washington, and Alexander C. Ekstrom,
 16 Assistant United States Attorney for said district, responds to
 17 defendant's motion to suppress evidence (ECF No. 47) as follows:

18 The Defendant files a motion to suppress the video
 19 depictions recorded by a pole camera, which is an instrument used
 20 by law enforcement to video record the activities of individuals
 21 being investigated. The advantage of a pole camera to law
 22 enforcement is that it saves the time and manpower required to
 23 conduct around the clock surveillance. As in this case, law
 24 enforcement is authorized to use the pole camera only to
 25 recorded activities that are otherwise open to public view, and
 26 not protected by the 4th Amendment. The pole camera was attached

1 to a utility pole adjacent to the property. The Defendant's
2 backyard is not surrounded by a solid fence, and any activities
3 around the residence can be plainly seen by any passerby from,
4 among other vantage points, Arousa Road, without invading the
5 curtilage of the home. See Attachment A (photos provided by TFO
6 CLEM). Consequently, the Defendant has no expectation of privacy
7 merely because a video recording was made of activities that
8 could otherwise be seen by the naked eye from any passerby. See
9 *United States v. Jackson*, 213 F.3d 1269, 1281 (10th Cir. 2000),
10 *judgement vacated on other grounds by*, 531 U.S. 1033)(use of
11 video cameras on telephone pole outside defendant's residence did
12 not violate Fourth Amendment), *United States v. Vankesteren*, 553
13 F.3d 286, 291 (4th Cir. 2009)(noting that the use of surveillance
14 camera to film an open field does not violate a reasonable
15 expectation of privacy); *Oliver v. United States*, 466 U.S. 170,
16 179 (1984) ("[O]pen fields do not provide the setting for those
17 intimate activities that the Amendment is intended to shelter
18 from government interference or surveillance."), see also *Katz v.*
19 *United States*, 389 U.S. 347, 347 (1967)("What a person knowingly
20 exposes to the public, even in his own home or office, is not a
21 subject of Fourth Amendment Protection.")

22 The Defendant's attempt to put pole cameras in the same
23 category as GPS monitoring devices, which the Supreme Court
24 recently found required a warrant after years of providing law
25 enforcement guidance that a warrant was unnecessary, is not
26 novel. See *United States v. Anderson-Bagshaw*, 509 Fed.Appx. 396
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1 (6th Cir. 2012) (where the court nonetheless found no Fourth
2 Amendment violation in pole camera filming backyard from adjacent
3 vacant lot, from utility pole). In *United States v. Taketa*, 923
4 F.2d 665 (9th Cir.1991), the Ninth Circuit found that while a DEA
5 agent had a reasonable expectation of privacy in his office, and
6 that expectation was violated through the use of hidden video
7 surveillance, however, the court noted, "Video surveillance does
8 not in itself violate a reasonable expectation of privacy.
9 Videotaping of suspects in public places, such as banks, does not
10 violate the fourth amendment; the police may record what they
11 normally may view with the naked eye." *Id.* at 677. In *United*
12 *States v. Nerber*, 222 F.3d 597 (9th Cir.2000), the Ninth Circuit
13 suppressed hidden video surveillance, but did so because it found
14 that drug dealers had a legitimate expectation of privacy in
15 their hotel room after police informants left.

16 In *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th
17 Cir.1987), cited by the Defendant, the police placed a camera on
18 top of a power pole overlooking the defendant's ten-foot-high
19 fence surrounding his back yard. The court found that the
20 defendant had a reasonable expectation of privacy that would have
21 been violated because the fence surrounded his curtilage. *Id.* at
22 251 and 251 FN1 (noting the presence of a 10-foot-high metal
23 fence, as opposed to chain link fence elsewhere on property). In
24 this case, however, the pole camera did not record anything that
25 could not have been seen through the chain link fence by a person
26 standing on the side of the road where the camera had been

1 affixed. When the Defendant and others conducted target practice
2 near a road where they could easily be observed, they exposed
3 their activities to the public. As such, whether the area is or
4 is not curtilage is inapposite, the argument fails under *Katz*.
5 Accordingly, the Defendant's motion should be denied.

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7 DATED this 26th day of September, 2013.

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9 United States Attorney

10 s/Alexander C. Ekstrom
11 ALEXANDER C. EKSTROM
12 Assistant United States Attorney
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27 Governments Resp. Mot.
28 Suppress

1 I hereby certify that on September 26, 2013, I electronically
2 filed the foregoing with the Clerk of the Court using the CM/ECF
3 System which will send notification of such filing to the
4 following, and/or I hereby certify that I have mailed by United
5 States Postal Service the document to the following non-CM/ECF
6 participant(s): John Matheson.

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